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Secession within the Union: Scotland said NO, but the quest for a legal framework continues

September 19, 2014



By Catherine Brölmann and Thomas Vandamme

By a narrow margin, the 300-year-old union between Scotland and the rest of the United Kingdom survived the referendum held on 18 September 2014. British – and Scottish – membership in the EU has been one of the prominent factors in the political debate, which has addressed issues like the effect of a reduced UK on the balance of power within the EU and the consequences of Scottish independence for the imminent ‘Brexit’ referendum. Yet the legal framework for secession

within the Union, which these political narratives presuppose, is all but clear. In this blog we explore some important legal and political aspects of the scenario of secession within the Union.

The question of the legal framework remains highly salient even given the victory of the No Campaign. Scottish independence may have been averted for now, but other regions in Europe with strong cultural and linguistic identities have similar aspirations. There is, of course, Catalonia where a referendum on independence (although *ex ante* declared illegal by the Spanish Constitutional Court) is scheduled for 9 November 2014. Meanwhile, in the Belgian region of Flanders, a persistently vital pro-independence movement experiences one electoral success after another, rendering the country increasingly difficult to govern. Political developments such as these remind us that secession of federated states, countries, or regions from EU Member States is a real possibility.

The common element in the Scottish, Catalan, and Flemish examples is that these regions all seek independence, *not* withdrawal from the European Union. Thus the legal discourse is not just one of possible *secession*, but also one of *succession*. Can a temporary ‘gap’ in EU Membership, with corresponding legal difficulties, be avoided? Can certain rights and privileges under EU law be retained by the seceding territory? In the Scottish context the latter question became especially prominent in relation to the possible extension to Scotland of the British Rebate (one legacy of Margaret Thatcher that remains much appreciated on both sides of Hadrian’s Wall) and to a possible continuation for Scotland of the British opt-out of the common currency. In short, the scenario of secession *within* the Union is primarily one of legal succession rather than secession.

In the first place, a legal appraisal of these issues leads to the framework of public international law – both

when it comes to the actual (unilateral or consensual) *secession*, and when it comes to *succession* to selected international rights and obligations (such as membership of an organisation) of a preceding state. However, the different rules and practices in public international law do not give an unambiguous, let alone exhaustive, answer to such legal questions. Legal *succession* of the new state to rights and duties of the predecessor state is, in practice, negotiated and decided on a case-by-case basis (leaving aside the contested regime of the 1978 *Vienna Convention on Succession of States*, which, though in force, has not found wide acceptance).

Meanwhile, in case such rights and duties are related to membership of an international organization, international law construes the institutional order of the organization as a separate legal order, or at least as *lex specialis* and defers decisions on membership to the organization itself. Yet, the EU legal framework does not address possible consequences of secession and succession of parts of current EU Member States. The EU's political response (most notably through Romano Prodi, Viviane Reding and José-Manuel Barroso) has consistently been that secession of part of the territory of a Member State entails an automatic exit of that territory from the EU. Consequently a new application for EU Membership would have to be set in motion if the new entity desires to 'become' a Member State of the European Union.

In the context of EU law this is indeed the key question of the debate on a suitable legal framework: does a seceded territory upon independence become a third state which consequently must apply for EU Membership (under Article 49 TEU) or do the EU Treaties need to be amended in order to accommodate the new situation (under Article 48 TEU)? Let there be no mistake that both are complex procedures, if only because they both involve the agreement of the current Member States and ratification by their respective parliaments. Spanish Prime Minister Rajoy has hinted that the cooperation of Madrid should not be taken for granted in the Scottish independence scenario (let alone in the Catalan independence scenario). This said, a major legal difference between the procedures is that by Treaty amendment (Article 48 TEU) a legal vacuum would be avoided as the new state, throughout the process, would remain embedded in the EU organization.

The arguments in support of the 'Article 48 scenario' are manifold; but the one most often used involves the concept of EU citizenship. The plethora of rights possibly at stake in case of a loss of EU citizenship is formidable, ranging from social security to basic free movement rights. Indeed, the public at large seems to greatly appreciate their EU citizenship, judged by the anxiety over its possible loss in case of secession. The [Citizens' Initiative on the Preservation of EU Citizenship in Case of Secession of a Territory of a Member State](#) is highly informative in this respect.

Those who advocate the 'Article 48 scenario' stress the *autonomous* nature of EU citizenship and construe a notion of 'internal enlargement' on the basis of an uninterrupted EU citizenship status for the subjects of the prospective new state. In that spirit, the Scottish Government [held](#): "*As many experts have confirmed, Scotland is part of the territory of the European Union and the people of Scotland are citizens of the EU. There is no provision for either of these circumstances to change upon independence*". In reality, expert opinions seem to diverge a great deal more than this quote would lead us to believe. The contrary position, namely that of EU citizenship as *derivative* of national citizenship, is also widely accepted and implies, of course, that one loses one's status as EU citizen following the secession of the territory of which one becomes a 'new' subject. The outcome of this debate ultimately depends on the perspective one takes: that of the states ('sovereign statehood') or that of the population ('citizenship'). In the latter case, a construct such as that of 'automatic succession', as has emerged in human rights discourse, may open up new possibilities while remaining in a classic legal framework.

Thus, an exploration of the legal and political aspects of the scenario of secession within the Union is a

complex, multi-faceted exercise. It is also a timely matter, even if not immediately called for by Scottish independence. An expert round table hosted by *ACELG* and *ACIL* at the University of Amsterdam has produced a collection of short essays that swiftly identify and outline the legal questions at issue, both from a public international law and a European law perspective. It can be accessed here: <http://acelg.uva.nl/publications/secession.html>

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